

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GORDON L. TILLMAN and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, Calif.

*Docket No. 95-2797; Submitted on the Record;
Issued June 5, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for review of the merits of his claim under 5 U.S.C. § 8128.

On a prior appeal, the Board, in a decision and order dated January 5, 1995, found that appellant had not established that he was disabled from January 28 to April 18, 1993 due to his employment-related conditions. The Board noted that appellant had performed light duty at the employing establishment from June 4, 1992 until he stopped work on January 29, 1993 and found that he had "not submitted any medical evidence indicating that he could not perform his light-duty assignment from January 29 to April 18, 1993."¹

Subsequent to the Board's January 5, 1995 decision, appellant submitted to the Office a report from his attending physician, Dr. Mark D. Robinson, a Board-certified internist, dated January 31, 1995. In this report Dr. Robinson stated:

"It has been brought to my attention that there has been some confusion or misunderstandings surrounding the return to work status of my patient as of his [January 28, 1993] visit to my office. As I review his chart I see that on [December 17, 1992], he was prescribed restricted or limited duty at work which was to last through [February 8, 1993]. As I review the data in the patient's chart and recall the circumstances of that time, I wish to say that appellant was not to return to work as of the [January 28, 1993] visit.

"By the time of that visit he had radiographic studies as part of his evaluation, including the MRIs [magnetic resonance imaging] of his cervical spine on [November 12, 1992] and his thoracic spine on [December 28, 1992]. Given the clinical and neuroradiographic data available at that time, his return to work status

¹ Docket No. 93-2164.

was pending his further neurologic and neurosurgical consultations which were pursued. On [January 28, 1993] he was declared permanent and stationary. No dates were placed on his return to work form as part of an attempt to avoid confusion regarding his return to work status. His return to work form as [January 28, 1993], was to void the limited-duty plans and dates outlined in his previous return to work slip.

“Furthermore, let me highlight the fact that his absence from work as of [January 28, 1993], was due to this occupational medicine case and discussions in writing regarding the relationship between his injury and underlying problems have already taken place and can be cited in reference to this discussion.”

By decision dated July 18, 1995, the Office found that appellant’s request for reconsideration was insufficient to warrant review, as it “neither raised substantive legal questions nor included new and relevant evidence.”

Section 8128(a) of the Federal Employees’ Compensation Act² vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may –

‘(1) end, decrease, or increase the compensation awarded; or

‘(2) award compensation previously refused or discontinued.’”

Under 20 C.F.R. §10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

The Board finds that the Office improperly refused to reopen appellant’s case for review of the merits of his claim under 5 U.S.C. § 8128.

The January 31, 1995 report from Dr. Robinson, submitted to the Office by appellant, was new, in that it was not first received by the Office until after the Board’s January 5, 1995 decision and order. This report was also relevant, in that it addressed the period of disability in question – that beginning January 29, 1993. The Board found that appellant had not submitted any medical evidence that he was unable to perform his light-duty assignment beginning January 29, 1993; the January 31, 1995 report from Dr. Robinson states that appellant “was not

² 5 U.S.C. § 8128(a).

to return to work as of the [January 28, 1993] visit.” This plainly is relevant to appellant’s claim for compensation for the period from January 29 to April 19, 1993.

The decision of the Office of Workers’ Compensation Programs dated July 18, 1993 is reversed and the case remanded to the Office for a decision on the merits of appellant’s claim for compensation for the period from January 29 to April 19, 1993.

Dated, Washington, D.C.
June 5, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member